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In the Supreme Court of the United States

No. 20. Original—October Term, 1929.

EX PARTE: In the matter of the Petition of CHARLES F. HOBBS, Commissioner of Insurance of the State of Kansas, and WILLIAM A. SMITH, Attorney-general of the State of Kansas, for a Writ of Mandamus to the Honorable John C. Pollock, District Judge of the District Court of the United States for the District of Kansas.

BRIEF OF RESPONDENT

IN OPPOSITION TO:

(a) APPLICATION OF PETITIONERS FOR LEAVE TO FILE A REPLY TO THE RETURN;

(b) APPLICATION OF PETITIONERS FOR APPOINTMENT OF A COMMISSIONER TO TAKE EVIDENCE.

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STATEMENT.

The return filed by respondent was directed to a rule to show cause why respondent should not—

> "call to his assistance two other federal judges as provided by section 266, as amended, of the judicial code, being title 28, section 380, United States Code, to hear and determine the motion and prayer of the *plaintiff* for an interlocutory injunction."

The rule was issued at the instance of the *defendants* to the suit and not of the plaintiff. The return to the rule shows various reasons why it should be discharged, among others, that there is no application for interlocutory injunction pending (Return to Rule, p. 2); that the application for an injunction set up in the petition for mandamus is not the application which was before the Court when the matter came on for hearing below, but had been expressly withdrawn (Return to Rule, p. 2); that the application for injunction was not made pursuant to section 266 of the judicial code by service of notice upon the Governor, etc., wherefore there was no power in respondent to assemble a three-judge court (Return to Rule, p. 2); that the petition for mandamus inadequately sets out the matters occurring in the court below (Return to Rule, p. 3); that petitioners have threatened revocation of licenses without any authority under the law to take such action (Return to Rule, p. 3); that respondent has no knowledge of any agreement to suspend action in the case because of proceedings in Missouri, and the cases have not been suspended for any such reason (Return to Rule, p. 3).

Further affirmative reasons for discharge of the rule appear in the return, which it is not necessary to here reiterate.

Petitioners now present a proposed reply to the return. It is the view of the respondent that, if such a reply is either not admissible under proper practice, or the same is of such nature that if it were on file it would be stricken off, then leave to file it ought to be

denied. It is not necessary to examine the proposed reply in detail, because the petitioners have set out in their brief for the appointment of a commissioner what they consider to be the gist of their reply and what they propose to prove under it. These, as set forth by the petitioners in such brief, are:

(a) Petitioners "desire to show by the evidence *** the affidavits of J. V. Parker and Charles R. Street." (Brief on motion for appointment of a commissioner, p. 3.) (If these affidavits have any propriety at all, they were part of the record which should have been produced upon the original application. They cannot be injected into the hearing after return to a rule has been filed. Even now, they are not offered in complete form.)

(b) Petitioners state that they desire to show by evidence that a great many suits were pending in Missouri bearing some similarity to Kansas cases and that there was "a conversation between the attorneys for the opposite parties in the Kansas cases," etc. (Brief, p. 4.) (There is no suggestion in the reply or the brief that respondent had any knowledge of such conversations or participated in them in any way, or was influenced by anything that may have been discussed between counsel.)

(c) "Petitioners desire to show by evidence" that they did not expressly consent to the appointment of a master (Brief, p. 4).

(d) "Petitioners desire to show *** there was no evidence introduced to the effect that petitioners threat-

ened to revoke the licenses." (In the proposed reply of the petitioners to the return (at p. 5), they set forth that the petitioners had power under the statutes to cancel licenses, and assert that it is an appropriate method of enforcement of a rate order. There is no denial by petitioners that they served a written notice that they would enforce the rate order by means within their power. They admit serving a written notice that petitioners would proceed "to enforce the rate order" (Return to Rule, p. 13), and assert in the proposed reply to the rule (at p. 5), that the means of such enforcement is by cancellation of license.)

We specifically call to the attention of the Court that in the proposed reply the petitioners expressly admit (Reply of Petitioners, p. 6) that the motion for assembling of a three-judge court, of April 11, 1928, attached to the petition for mandamus as Appendix C, "was withdrawn by the plaintiff by oral statement before the respondent at the hearing before him on May 10, 1929." It is also expressly admitted in this proposed reply that respondent's Exhibit 1 "was the only motion for interlocutory injunction presented by the plaintiff to the respondent." (Reply p. 6.) The rule was issued against respondent under a petition which clearly carried the inference that the application for a three-judge court, attached to the petition as Appendix C, was before the court below. This court was warranted in assuming that it was action under that applicaton which it was seeking to coerce. As it now appears by admissions of the respondent that the record is not as the court

was so led to believe, this Court would be warranted in dismissing the petition for mandamus without any further consideration of other matters involved.

If proper practice in this court requires a court to take the answer of the respondent as true, then no reply should be permitted and no commission for taking evidence should issue.

BRIEF OF ARGUMENT.

The action of the petitioners, in presenting a proposed reply and asking for appointment of a commissioner, is an admission of the sufficiency of the answer of the respondent, if the facts therein be accepted as true.

Petitioners call attention to *Rule 5* of this court, whereby it is provided that:

> "This court considers the former practice of the courts of King's Bench and of chancery in England as affording outlines for the practice of this court in matters not covered by its rules or decisions or the laws of Congress."

By "*former* practice" of the court of King's Bench, we understand, as the petitioners evidently do, that the practice of the court of King's Bench is adopted as it existed at the time of the formation of this government without consideration of acts of parliament which may have been enacted since the formation of the government of the United States.

A text dealing exclusively with practice respecting mandamus in the courts of King's Bench of England is

that of *Thomas Tapping on Mandamus.* In the edition of 1853 he says:

> "At common law, no traverse to a return was allowed, the only remedy then available for the prosecutor, if injured by a return false in fact, being an action on the case for such false return." (P. 422 *383.)

It is such common law practice which we regard as presumably in force in this court. In every work on mandamus reference is made to the *statute 9 Anne,* c. 20, s. 2. It is discussed by Tapping on Mandamus (P. 422 *383), and he notes, as the context of that statute indicates, that the statute of Anne permitted issue upon the answer or traverse of the facts in it, in cases affecting *municipal offices* and franchises. Tapping says that the statute of Anne "has application to municipal offices only." (P. 422 *383.)

The practice of permitting traverse in cases other than those involving municipal offices and franchises has arisen purely out of statutory provisions. Such statutory change was made in England in 1831. Tapping says that the provision of the statute of Anne "has been subsequently extended by *statute, 1 Wm. 4,* c. 21 (A. D. 1831) to writs of mandamus in all other cases." (P. 422 *383.) This statute, enacted in 1831, is not incorporated into the practice of this court, either by any act of Congress or by any rule of this court. The proposed reply presented herewith is mostly a conglomeration of legal conclusions and fails to comply with the rules of pleading.

In cases where, by statute, proceedings subsequent to a return are admitted, the matter assumes the position of a personal action and as to matters of confession and avoidance "pleas must be framed strictly in accordance with the rules of pleading which govern the legal formulae in such actions, in order that the defendant may be enabled to take and raise proper issues." All matters of confession and avoidance must be set up in formal pleas.

Tapping on Mandamus, p. 424 *386.

The petitioners concede that the principal thing sought by the reply is to create issues of fact upon matters occurring in the presence of respondent, a federal judge. Petitioners admit that matters occurring in the presence of the Court are generally held to be concluded by the statement of the judge as to what occurred in his presence, but say that this case does not fall within such rule because—

> "Those are cases, however, where it did not appear that the judge of the inferior court was deliberately acting in violation of a statute. Where, however, there is a question as to an alleged disqualification of the judge, his decision upon such question is not conclusive." (Brief of Petitioners on motion for appointment of a commissioner, p. 6.)

We are not clear what the ground for the distinction is for which petitioners contend, but it is evident that petitioners claim that the matters shown in the answer of the respondent to the rule (reciting proceedings before him and occurring in his presence), are the sub-

ject of hearing before some commissioner where the respondent shall debate with bystanders respecting what occurred before him upon the application for interlocutory injunction. It is respectfully submitted that if a replication may be permitted in some mandamus cases, it is not warranted in an application for a mandamus against a federal judge respecting matters which he sets up in his answer as having occurred before him and in his presence. *The answer of a judge respecting matters occurring in his presence is conclusive.*

The reasons which impel the rule that the *answer of a judge,* respecting matters which happen before him, must be taken as *conclusive* are stated in the case of *State ex rel v. Cooper,* 107 Tenn. 202, 212.

> "A different rule would lead to endless confusion. It would substitute the recollections of counsel and bystanders for that of the trial judge. It would virtually put the judge himself on trial whenever a difference arose between him and litigants or their counsel. Affidavits and counter affidavits might be heard, and a trial within a trial would result."

In the case of *Black v. Youmans,* 245 Fed. Rep. 460 (Circuit Court of Appeals, Eighth Circuit), the matter before the Court was a petition for mandamus to compel respondent to settle and sign a bill of exceptions. The Court, speaking of the answer of the Judge to the mandamus petition, in that case says, that the matter therein referred to—

> "is a statement with reference to facts occurring before him, and within his personal knowledge, and his return is conclusive,"

citing cases.

In the case of *in re: Streep,* 156 U. S. 207, the application was for a mandamus where a judge resettled a bill of exceptions. Affidavits were presented showing that the bill of exceptions as signed by the Judge was incorrect, that it was incorrect according to the stenographer's minutes. The Court declined to enter into consideration of such affidavits, and denied the mandamus. The statement of the matter is by the Chief Justice.

In the case of *Thatcher v. Killits,* 195 Fed. Rep. 471, (Circuit Court of Appeals, Sixth Circuit), mandamus was sought to compel the Court to insert certain statements in the transcript of disbarment proceedings.

> "Relator seeks to traverse this return of the District Judge (to the mandamus), and to have a trial of the issue whether the judge did or did not read the testimony, and perhaps of the issue whether the judge made the statement in question. We regard it as the clearly settled rule that where a judicial officer is engaged in settling a bill of exceptions, or in analogous duties, and where a mandamus is sought against him in connection therewith, his return, as to a fact occurring before him, and within his personal knowledge, is, for the purposes of the mandamus proceeding, conclusive. This is the settled rule of the Supreme Court of the United States and of all the states in this circuit, except so far as modified in Kentucky by statute."

Citing cases.

The Court says (P. 473):

> "It is not to be tolerated that a party may raise and try out separate issues upon a variety of incidents occurring during a previous trial. This would make litigation never-ending. We think the established rule must stand, and must be applied in this case, and that the return of the trial judge must be taken as true."

In the case of *People ex rel v. Judge of Wayne Circuit Court,* 23 Mich. 536, petition for mandamus was to compel the respondent to set aside a judgment, (wherein the Court had entered a judgment upon a trial before the Court without a jury), and to enter an order for a trial by jury. The petitioner asserted the making of a jury demand. A rule to show cause was made upon the respondent.

> "The respondent answered, stating what he alleged to be facts, as to what had transpired in his presence. Some of the statements of fact in the answer, as to what action the Circuit Judge had taken, and what had occurred in the premises within his own knowledge, varied essentially from the statements of the same in the petition."

The memorandum opinion reads:

> "The Court held that the return must be conclusively taken to be true so far as it states facts as to the respondent's own action and what occurred in connection therewith within his own knowledge, and that an issue of fact would not be allowed to be framed upon it. Mandamus denied, with costs."

Before entering further into the reply, we should briefly call attention to the *cases cited by petitioners.*

The *principal cases relied upon by petitioners are:*

United States v. Boutwell, 17 Wall (84 U. S.) 604; 21 L. Ed. 721.

United States v. Schurz, 12 Otto (102 U. S.) 378.

United States v. Fisher, 222 U. S. 204.

No one of such cases was an original mandamus in this court, nor one originating in a circuit or district court of the United States. They are cases commenced in the Supreme Court of the District of Columbia.

This Court clearly pointed out in *United States v. Schurz,* 102 U. S. 378, 393, that the jurisdiction and powers to be exercised by the Supreme Court of the District of Columbia are acquired from the laws of Maryland, of which the District was formerly a part. There is no decision in any of the cases cited by petitioners of the point here in question, and far-fetched inferences are drawn. The cases are not fairly to the effect as contended by petitioners.

The case of *State of Florida v. State of Georgia,* 17 How. 478, cited by petitioners at page 4 of their brief, was a suit in chancery by one state against another to establish a boundary.

The case of *State of California v. Southern Pacific Co.,* 157 U. S. 229, cited by petitioners at page 4, was a suit in equity by the State of California against the Southern Pacific Company to declare the ownership of land.

Petitioners cite the cases of *State of Florida v. State of Georgia,* 17 How. 478 and *State of California v. Southern Pacific Co.,* 157 U. S. 229, to the effect that the Court is not bound by the English common law

practice. This indicates that petitioners consider the *statute of 1 Wm. 4, c. 21, enacted by the English parliament fifty-five years after the formation of this government, to be inapplicable,* and that they ask this Court to extend Rule 5 to embrace such statute into the practice of this court. If such action by this court were sound, as a matter of discretion, in cases involving offices, franchises and similar matters seeking to reduce property or titles of office to possession, this Court should certainly not extend it to a case wherein a peremptory writ is sought against a federal judge to coerce his action. A federal judge should not be put in the position where bystanders and others present in a court, claiming to have knowledge of occurrences there, could state their recollections and thus take issue with him as to what occurred in his own court. Such proceeding would be so foreign to our conception of propriety that we do not believe this Court will create a new rule of practice to produce such result.

If reply to the return of a federal judge in a petition of this type *were allowed,* and if pleadings were loosely permitted so as to allow the matters to be incorporated in the form in which they are presented by the petitioners, *leave* to file the reply *should nevertheless be denied,* for reasons which we will state in the order in which they appear in the proposed reply:

Point I, (a), Reply, p. 3: Petitioners admit that application for injunction was through the medium of respondent's Exhibit 1 (Reply p. 3); admit that the application to assemble a court of three judges, attached

to the petition for mandamus as Appendix C, was expressly withdrawn by the plaintiffs in the court below and was, therefore, no part of the record before respondent upon which action could be invoked (Reply p. 6). The action of the petitioners in securing an alternative writ against respondent upon the presentation of Appendix C as if it were the petition under which action was requested, whereas it is now admitted expressly by the petitioners that such matter was expressly withdrawn in the court below, should move this Court to discharge the rule and dismiss the petition. Had this Court been properly and fairly advised of the situation in the beginning, an alternative writ would not have issued.

Point I. (b), Reply, p. 4: Petitioners admit that application for interlocutory injunction did not call for a three-judge court, was not pursuant to notice to the Governor, as stipulated by section 266 of the judicial code. There is not, and cannot be, any issue of fact therefore as to the assertion in the return to the rule and respondent could not be compelled to assemble a three-judge court and had no power to do so under the application presented.

Point I. (c), Reply, p. 4: Petitioners seek to inject into the record affidavits produced on the hearing below. They were no part of the record in this court when the alternative writ was issued and it is not proper to enlarge or alter the record in this particular sense.

The facts upon which petitioners secured their alternative writ are set forth in a petition, in which peti-

tioners produced what they asserted to be the record of proceedings of the court below. With their proposed reply, so-called, they seek to supplement and alter this record, asserting matters not contained in the original record under which the alternative writ issued. The action of the Court in granting the alternative writ was based upon the record as it existed, and after an alternative writ has issued and answer made to the writ as issued, it is not proper to confuse the issues by thereafter producing affidavits designed to strengthen or supplement the record as it theretofore existed. Production of further affidavits after issuance of alternative writ and answer filed thereto has been held not permissible.

See *McKenzie v. Ruth,* 22 O. St. 371.

The foregoing considerations entirely aside: Whether the facts contained in the affidavits did or did not warrant respondent in issuing the injunctional order which he issued, is foreign to the inquiry here. *The question here is whether the application for an injunction* said to be pending before respondent *requires assembling a three-judge court.* It may well be that the affidavits presented pursuant to the application for injunction were inadequate to warrant any injunction, or proceeded upon grounds which respondent was not authorized to weigh on the application, but this in no way imposed the duty on respondent to assemble a three-judge court. They bear exclusively upon the propriety of issuing an injunction through the medium of a single judge, which is not a question before this court for consideration.

Point II. Reply, p. 5: Petitioners assert that they have power to cancel licenses, and deny that they have disclaimed or renounced such power. They say that this is within their powers under the statute for supposed violation of a rate order. It having been shown to the respondent that there was an intention to exercise such power (Return to rule, p. 13), then whether respondent was sound in his view of the law that there was no such power existing in the Superintendent of Insurance, or whether he was in error on that subject is not a matter before this court for consideration upon the rule to show cause why a three-judge court should not be assembled.

Point III. Reply, p. 6: No issue of fact can properly arise, nor is any issue of fact presented by Point 3 of the Reply.

Point IV. Reply, p. 8: Point IV presents no issue of fact, for it is expressly admitted by petitioners that no notice, as provided by section 266 of the judicial code, was served upon the Governor of the State (Reply, p. 4). No question of fact is presented by the issue under point IV, but the question of law is presented that altho the parties did not proceed under section 266, and did not serve notices upon the Governor and Attorney General, as provided by the section, that the *respondent,* the trial judge, had a duty and that it was "his duty to require that notices under the statute should be given" (Reply, p. 8). It is not the duty of a judge to serve notices or to impose duty of notice upon parties. If they do not give appropriate notice as required by

law, their application for relief will merely be refused until they have made compliance. If they never make compliance, they will secure no relief. There is no issue presented by point IV which could conceivably produce evidence bearing on the issues in this court.

Point V. Reply, p. 8: This point contains nothing but argument of law and admissions and presents no contested issue of fact.

Point VI. Reply, p. 8: The only matter of materiality in this point is the admission that application for interlocutory injunction was made under respondent's Exhibit 1, and "admit that the only motion for an interlocutory injunction before the Court" was such application. There is no controverted issue of fact presented under point VI.

Point VII. Reply, p. 9: This point also presents no issue bearing on the assembling of a three-judge court. As typical of the nature of the reply, we quote from page 10 of the Reply, where it is said: "Petitioners deny that they permitted an order for the taking of depositions in said case, but admit that they consented thereto." There is no statement of fact in the return which is controverted under this point which bears upon the issue before the court.

As typical of the whole reply, we quote point VIII. because it is short, and ask the Court to consider the strictures we make upon it as applicable to all the remainder of the so-called reply also:

> "Petitioners admit that the bill of complaint in said case, and the other cases referred to in the petition, contain allegations of diversity of citizenship in addition to allegations charging unconstitutionality of the statute and of the order; and deny that the fact that an interlocutory injunction was asked and granted does not of necessity involve determination of any constitutional questions under the federal constitution, or necessarily require a statutory three-judge court, or necessarily involve an appeal to the Supreme Court."

We respectfully submit that the so-called reply is nothing but a legal argument, and presents neither an issue of law nor of fact. The brief in support of motion for appointment of a commissioner sets up *what are supposed to be the issues of fact* raised by the reply. It loses sight entirely of the fact that the *rule on respondent is* to show cause *why he should not assemble a three-judge court* to hear a specified application for injunction. An application for injunction was set out in the petition as Exhibit C thereto, which it is now admitted was not before the Court and was expressly withdrawn verbally in the court below. As the main ground of the petition, therefore, is shown to be false, the reasons which impel the granting of the alternative writ fail, and the rule should be discharged.

Petitioners set forth in their brief what *facts they expect to show* before a commissioner.

They say they expect to show by evidence (Brief on motion for appointment of a commissioner, p. 4) that there was a conversation between attorneys in the Kansas rate case out of the presence of the respondent.

No matter what conversations occurred between counsel, it specifically appears that respondent had no knowledge thereof and did not act thereon (Answer to Rule, p. 3). The evidence of what occurred between counsel outside of court in the matter can not be competent in the case and is entirely irrelevant to the inquiry before this Court.

The next bit of evidence which petitioners say they wish to offer (Brief on motion for appointment of a commissioner, p. 5) is that they did not consent to the appointment of a master. As it is admitted that petitioners did call up sufficiency of the bill of complaint before respondent and have it adjudged before him individually, whether or not they also waived by consenting to appointment of a master is merely cumulative evidence of waiver, and whether proven or disproven could not possibly affect the result.

Petitioners say that they would offer evidence that petitioners "stated to the judge that Commissioner of Insurance Hobbs intended to enforce the rate order and to do everything necessary for its enforcement." In the reply to the return, petitioners explicitly assert that one of these enforcement provisions is the right to cancel licenses. (Reply of Petitioners, p. 5.) This *admission* of petitioners, that they intended to enforce the order in any way they could and that one of the things they could do was to cancel licenses, completely confirms the position of respondent, that there *was* in effect *a threat to revoke licenses* by the statements and admissions of the petitioners in open court below.

Even were it true, however, that in the hearing below there was "no evidence introduced to the effect that petitioners threatened to revoke licenses" (Brief of Petitioners on motion for appointment of a commissioner, p. 5), this would bear only on the question of the sufficiency of evidence to sustain the injunction issued by respondent below. *It has no bearing upon his duty to assemble a three-judge court.* Petitioners virtually concede that they may not take evidence upon the occurrences in the court when they stated their intent "to enforce the rate order," (intending thereby to make a threat of revocation of licenses because of institution of suits in the federal court). That the issues of fact should be made upon the language employed, and whether or not it involved a threat to cancel because suit was brought in the federal court or the language employed was not reasonably designed to carry that impression, is certainly an issue upon which this Court should not permit hearing before a commissioner, as is proposed in the brief on the motion for appointment of a commissioner (p. 6), petitioners having explicitly stated the points on which they desire to take evidence. None of these questions bear in any proper way upon the issues here existing; namely, whether the application for an injunction below was such, and the notices served for bringing it before the court were such, as to compel the court below to call two judges to his assistance.

Petitioners admit that no notices were given and no application made purporting to rest upon the grounds which make section 266 applicable, but application pro-

ceeded upon grounds independent thereof. Whether the respondent was justified or not justified in granting an interlocutory injunction, it is unquestionable that no situation was presented requiring the assembly of a three-judge court.

There is nothing presented which would justify the appointment of a commissioner or the taking of evidence, and there is nothing presented in the reply, presenting issues of fact, which can or ought to be heard or considered by the court. We therefore respectfully submit that the application for leave to file a reply should be denied. The answer of the respondent to the rule and the admissions made by petitioners in their briefs herein are such that no good can be accomplished by retaining the petition or further perpetuating the rule to show cause. Therefore the rule should be discharged and the petition dismissed without putting the respondent to further trouble in the matter.

Respondent makes no suggestions to the court as to the action it should take, because of the fact that the petition for mandamus misleadingly stressed an abandoned application for injunction which expressly called for a three-judge court and was pursuant to service of notice upon the Governor and Attorney General under section 266 of the judicial code (See Exhibit C, attached to petition for mandamus).

Petitioners expressly admit now in their reply that the answer is true, wherein it states that said application had been *expressly withdrawn*, was not an application which respondent in any way considered or had

before him, and that the only application for an injunction upon which action of respondent was asked was one which did not purport to act or proceed under section 266.

Respondent feels that his duty to this court is discharged by calling attention to the fact that it was induced to grant the alternative writ against respondent by the prominent presentation of a discarded application for injunction as if it were properly part of the record.

Respectfully submitted,

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